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CALIFORNIA PENAL CODE SECTION 645: LEGISLATORS PRACTICE MEDICINE ON CHILD MOLESTERS

On September 17, 1996, California Governor Pete Wilson signed into law the nation's first statute mandating chemical castration¹ for certain recidivist sex offenders.² The law authorizes courts to impose medroxy-progesterone acetate (MPA) treatment upon parole of first time offenders of specified sex offenses and requires MPA treatment upon parole of second time offenders where the victim is under the age of thirteen.³ Assemblyman Bill Hoge, the author of the bill, said at the signing ceremony, "We have now set the stage for America We can do this all over the country. This is going to have the biggest impact on this horrible, horrible crime of any legislation ever seen."⁴

In the past several years, California actively pursued legislative remedies to combat the troubling problem of recidivism of convicted sex offenders. The first of such remedies was the Sexually Violent Predators Act, permitting the Departments of Corrections or Mental Health to recommend civil commitment for particularly violent sex offenders.⁵ The

1. The term "chemical castration" is something of a misnomer. Unlike surgical castration, it does not involve a mutilation of the body, and is not permanent. See Linda S. Grossman, *Research Directions in the Evaluation and Treatment of Sex Offenders*, 3 BEHAV. SCI. & L. 421, 426 (1985). The term refers to the use of antiandrogens, which are synthetic hormones that decrease the body's production of testosterone, for the treatment of certain sexual disorders. See *id.* The treatment specified in the statute is discussed in some detail in this Comment. See *infra* Part I(B) and Part III(A).

Throughout this Comment, the terms "chemical castration" and "MPA treatment" have the same meaning. Generally, "chemical castration" is used in the sections of the Comment concerning the legislation, while "MPA treatment" is used in the section describing the medical aspects. The term "chemical castration," rather than the neutral "MPA treatment," is used intentionally to emphasize the profound effect that this medication has on the body.

2. See CAL. PENAL CODE § 645 (West Supp. 1997), 1996 Cal. Stats. 596 § 2 (A.B. 3339).

3. See *id.* § 645.

4. Dave Leshner, *Molester Castration Measure Signed*, L.A. TIMES, Sept. 18, 1996, at A3.

5. See CAL. WELF. & INST. CODE §§ 6600-6609.3. (West 1998). "Of 747 recommendations made so far . . . only two commitments have been made after

Registration Act,⁶ a community notification and registration law modeled after Megan's Law was then enacted.⁷ The chemical castration law followed.⁸

While California is the first state to enact a chemical castration law, it is not alone. Three other states, Georgia,⁹ Montana,¹⁰ and Louisiana¹¹ have since enacted similar legislation, while a number of other states

jury trials." Katherine Seligman, *Chemical Castration Costly, Will It Work*, S.F. EXAMINER, Sept. 15, 1996, at C1.

6. See 1994 CAL. STAT. 894 (A.B. 3513).

7. See CAL. PENAL CODE § 290 (registration), § 290.4 (community notification) (West Supp. 1999).

8. See *id.* § 645. Another bill, requiring released child sex offenders to wear an identification bracelet, was also introduced, but not enacted. See A.B. 614, Reg. Sess. (Cal 1997). This bill would have required convicted child molesters to wear a two-inch wide metal bracelet, which would be engraved with the victim's name and age if the victim's family consented. See *id.* Unauthorized removal of the bracelet would send the molester back to prison for the remainder of his parole period. See *id.* Like the chemical castration bill, this bill was sponsored by the Women's Coalition. See Dan Bernstein, *Plan for Molester ID Bracelet Advances*, Sacramento Bee, Apr. 23, 1997, at A5.

9. See GA. CODE ANN. § 16-6-4(d)(2) (Supp. 1998). This section authorizes the court to require a person convicted of a first offense of aggravated child molestation to undergo psychiatric evaluation to determine if medroxyprogesterone acetate treatment would be an effective treatment, and if so, to require such treatment as a condition of probation. Section § 42-9-44.2 authorizes the Board of Pardons and Paroles to require counseling, at the parolee's expense, and medroxyprogesterone acetate treatment as a condition of parole of a person convicted of a second or subsequent offense of child molestation. See *id.* § 42-9-44.2.

10. See MONT. CODE ANN. § 45-5-512 (1997). Montana's statute, like California's, requires medroxyprogesterone acetate treatment following second conviction of an offense of certain enumerated sex offenses. See *id.* § 2. The treatment begins one week prior to release from confinement and continues "until the department of corrections determines that the treatment is no longer necessary." *Id.* § 4.

11. See LA. REV. STAT. ANN. § 15:538(C) (West Supp. 1999). This statute authorizes MPA treatment as a condition of probation, parole, or suspended sentence for certain sex offenses, including first convictions where the victim is under the age of twelve, and second or subsequent convictions of specified offenses. See *id.* The law requires that the treatment continue for the duration of the term of probation, parole, or suspended sentence, unless it is determined that the treatment is no longer necessary. See *id.* The offender pays the cost of the treatment under this statute. See *id.*

have recently considered chemical castration measures.¹² All of these measures contemplate statutes that either require or permit MPA treatment.

California's concern about the prevalence of sexual violence in the United States today is not misplaced.¹³ One study estimated that twenty percent of all females and ten percent of all males were molested before the age of eighteen.¹⁴ The public solution to preventing sexual offenses

12. These states include Alabama, H.B. 8 (Ala. 1997) (requiring chemical castration for second time sex offenses against children under the age of 13); Arizona, H.B. 2216, 43d Leg., 1st Reg. Sess. (Ariz. 1997); Colorado, H.B. 1133, 61st G.A., 1st Reg. Sess. (Colo. 1997) (requiring chemical castration of second convictions of sex offenses against children); Hawaii, S.B. 215, 19th Leg. (Haw. 1997) (permitting person convicted of second sex offense where the victim is under the age of 14 to be punished by medroxyprogesterone acetate treatment); Michigan, H.B. 4796, 89th Leg., 1997 Reg. Sess. (Mich. 1997) (requiring chemical castration of sex offenders as a condition of parole); Mississippi, S.B. 2042, 2465, 1997 Reg. Sess. (Miss. 1997) (requiring chemical castration for second conviction of rape and for a second sex offense); Missouri, H.B. 753, 89th G.A., 1st Reg. Sess. (Mo. 1997) (making MPA treatment a sentencing option for certain sexual offenders); New Jersey, S.B. 1568, 207th Leg., 1st Sess. (N.J. 1997) (requiring chemical castration of certain sex offenders); Oregon, H.B. 3672, 69th Leg., 1997 Reg. Sess. (Or. 1997) (permitting parole board to require a person to undergo chemical castration as a condition of post-prison supervision); Tennessee, H.B. 482, 483, 585, 100th G.A. (Tenn. 1997) (authorizing judges to impose chemical castration as condition of community supervision for life; mandating chemical castration of second conviction of sex offense where the victim is less than 13 years of age; permitting chemical castration treatment for second conviction of aggravated sexual battery against a child; requiring judges to impose chemical castration as a condition of community supervision for life of certain sex offenders); S.B. 1152, 1153, 100th G.A. (Tenn. 1997) (permitting chemical castration upon second conviction of aggravated sexual battery where the victims are children; authorizing judges to impose chemical castration as a condition of community supervision for life and mandating chemical castration for second sexual offense where victim is less than 13 years of age).

13. According to the Bureau of Justice Statistics, in 1991 there were more than 43,000 prisoners nationwide incarcerated for sexual offenses against children. See Lawrence A. Greenfeld, *Child Victimized: Violent Offenders and their Victims*, Table 1, *Bureau of Justice Statistics* (1996) (visited Jan. 12, 1999) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvoatv.pdf>>. In 1995, California reported that it had 13,548 incarcerated sex offenders, more than ten percent of the state's total prisoner population. See DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996 537 (1997).

14. See Gene G. Abel and Candice A. Osborn, *Pedophilia, in TREATMENTS OF*

and other acts of violence tends to focus on criminal penalties.¹⁵ Over the past decade, however, the medical community has been advocating a more comprehensive approach, stressing that these crimes are also a public health crisis.¹⁶

When properly administered, MPA treatment could be a valuable contribution from the medical community to respond to this crisis. The treatment works by reducing the amount of testosterone in the male patient through an injection of a synthetic progesterone.¹⁷ The use of MPA to treat individuals with certain sexual disorders, including pedophilia, has been studied in the United States since the late 1960s.¹⁸ Specialists have identified MPA treatment as the most promising available treatment for some sex offenders.¹⁹ Compared to other available psychiatric treatments, numerous studies indicate that MPA treatment produces the most favorable success rate in preventing relapse or recidivism.²⁰ However, the relapse rate is as high as fifteen percent when an individual is undergoing MPA treatment and rises considerably after MPA treatment is discontinued.²¹

In requiring sex offenders to receive a medical treatment, California,

PSYCHIATRIC DISORDERS 1960 (Glen O. Gabbard ed., 1995) (citing a 1986 study). A 1995 study on adolescent health by the Johns Hopkins School of Medicine reported that 10.5% of children between the ages of 10 and 16 suffered sexual assault or abuse. See Michele D. Wilson Alain Joffe, *Adolescent Medicine*, 273 JAMA 1657, 1657 (1995).

15. See James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12 HEALTH AFF. 7, 16 (1993).

16. See *id.* at 7. The Center for Disease Control has been approaching violence as a public health issue for a number of years, and in 1991 formed the National Center for Injury Prevention and Control. See *id.*; see also Robert E. Freeman-Longo, *The Treatment of Sex Offenders: Reducing Sexual Abuse in America*, 23 N.E. J. CRIM. & CIV. CON. 303, 309 (1997). The World Health Assembly and the American Psychological Association identified violence as a public health crisis. See *id.* The American Medical Association called sexual assault the "silent-violent epidemic" in the United States. See *id.* at 310 (citing American Medical Association, *Sexual Assault in America*, Nov. 6, 1995).

17. See *infra* Part I(B).

18. See, e.g., John Money, *Use of an Androgen-Depleting Hormone in the Treatment of Male Sex Offenders*, 6 J. SEX. RES. 165 (1970).

19. See Linda S. Grossman, *Research Directions in the Evaluation and Treatment of Sex Offenders*, 3 BEHAV. SCI. & L. 421, 435 (1985).

20. See *id.*; see also *infra* Part I(C) at 7-10.

21. See *infra* Part I(C) at 8-9.

at first glance, may appear to be responding to the public health model of violence prevention. A closer examination of the statute, however, indicates that California has simply grafted a medical treatment onto the criminal justice model, adding another type of punishment without reasonable assurance that the treatment will decrease the number of future sexual assaults. Employing a selective understanding of the available medical data, California would apply to a broad class of child sex offenders a medical treatment that may only be effective on a subclass of sexual offenders.²² By the terms of the statute, the legislature has prescribed a continuing medical treatment for a class of offenders without providing for the traditional role of the doctor: diagnosis, selection of the appropriate treatment, and monitoring of treatment are left to statutory provisions or are delegated to the California Department of Corrections.²³ Section 645 is a disturbing legislative usurpation of medicine to implement criminal justice policy.

This Comment examines California's chemical castration provision from a public policy perspective.²⁴ Part One discusses MPA treatment of sex offenders. This Part is divided into sections. The first section distinguishes the criminal conduct of sex offenders from the mental disorder pedophilia. The second section describes MPA treatment. The third section reviews medical research using MPA treatment to treat pedophilia. Part Two briefly outlines the use of MPA treatment in the criminal justice system to date. Part Three examines Section 645, its legislative history, and recent regulation and policy under the statute. Part Four explores several areas in which the absence of the sound contribution of the medical profession is most apparent. It looks at the statute's effect of imposing a "diagnosis" on convicted sex offenders, the troubling question of how dosage might be determined, and the uncertain duration of the treatment. It also discusses some medico-ethical and legal problems

22. See *infra* Part I(C) at 8.

23. See CAL. PENAL CODE § 645 (West Supp. 1997).

24. The constitutional issues presented by this legislation are beyond the scope of this Comment. For an Eighth Amendment examination of this statute, see Raymond Lombardo, Note: *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 FORDHAM L. REV. 2611 (1997). For constitutional analyses of MPA treatment, see Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279 (1994); Pamela K. Hicks, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641 (1993); Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1 (1990).

with the statute. This Comment concludes by suggesting that, while MPA treatment could play a valuable role in the prevention of child sexual abuse, California's provision has the effect of further punishment rather than competent medical treatment and crime prevention.

I. THE USE OF MPA IN THE TREATMENT OF SEX OFFENDERS

A. Distinguishing Among Sex Offenders

Before discussing the science of MPA treatment or the results of MPA research, it is necessary to distinguish among various terms. "Sex offender," "child molester," and "pedophile," are terms frequently used interchangeably.²⁵ "Pedophile," however, is a medical or psychiatric term that refers not simply to behavior, but also to particular cognitive and emotional states.²⁶ Not all people who commit sexual crimes against children are pedophiles, although all could be termed sex offenders or child molesters.²⁷

A child molester may have one or more causes for his conduct.²⁸ Some offenses against children are committed by individuals who have some degree of mental retardation and a consequent inability to appreciate the difference between appropriate and inappropriate sexual behavior.²⁹ An individual with an antisocial personality may commit sexual offenses against children simply because it is hurtful.³⁰ A schizophrenic individual may commit offenses because he has hallucinatory visions or

25. See Gene G. Abel & Joanne L. Rouleau, *Sexual Abuses*, 18 *Psychiatric Clinics of North America* 139, 140-41 (1995).

26. See Fred S. Berlin & Carl F. Meinecke, *Treatment of Sex Offenders with Antiandrogenic Medications, Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 138 *AM. J. PSYCHIATRY* 601, 602 (1981).

27. See Abel & Rouleau, *supra* note 25, at 140. Studies indicate that "between 40% to 50% of the sexual abuse of children is perpetrated by adolescents." *Id.* (omitting internal citations).

28. See Berlin & Meinecke, *supra* note 26, at 601-02; see also AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 525 (4th ed. 1994) (hereinafter *DSM-IV*); Vernon L. Quinsey & W. L. Marshall, *Procedures for Reducing Inappropriate Sexual Arousal: An Evaluation Review*, in *THE SEXUAL AGGRESSOR* 267 (Joanne G. Greer & Irving Stuart eds., 1983).

29. See Berlin & Meinecke, *supra* note 26, at 602.

30. See *id.*

voices commanding particular behavior.³¹ An adolescent may use a smaller child to learn about sex.³² Any of these individuals could commit the same criminal offense; each of these individuals would be diagnosed and treated differently in the medical community.³³ None of these offenders would be considered pedophiles in the psychiatric profession.³⁴

The medical research on the efficacy of MPA in the treatment of sex offenders has focused on the treatment of paraphilias.³⁵ Paraphilia, which includes pedophilia, is a category of mental disorder characterized by recurring, detailed sexual fantasies about deviant sex, sexual behavior enacting the deviant fantasies, and a compelling emotional desire to enact the fantasies.³⁶ Thus, the disorder is characterized by cognitive, behavioral, and emotional elements.³⁷ Although there is some dispute in the psychiatric community regarding the classification of certain sexual deviances as mental disorders,³⁸ the profession's diagnostic text, the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) includes paraphilias in its catalog of mental disorders.³⁹

31. *See id.*

32. *See* Abel & Rouleau, *supra* note 25, at 140.

33. *See* Berlin & Meinecke, *supra* note 26, at 602. *See also* DSM-IV, *supra* note 28, at 525. Frequently, a complete diagnosis indicates that a person with one paraphilic disorder also has another, or the paraphilia is present in combination with other non-sexual disorders. *See id.*

34. *See* Berlin & Meinecke, *supra* note 26, at 602.

35. *See id.* at 602-05.

36. *See id.* at 601.

37. *See* DSM-IV, *supra* note 28, at 528. A diagnosis of pedophilia is appropriate when the following elements are present:

1) Over a period of at least six months recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

2) The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

3) The person is at least age 16 years and at least 5 years older than the child or children in criterion A.

DSM-IV § 302.2.

38. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2081 n.3 (1997) (citing the opposing views of two *amici*, the American Psychiatric Association and the Menninger Foundation, regarding whether sexual deviances should be considered mental disorders).

39. *See* DSM-IV, *supra* note 28, at 524.

Pedophilia, as well as the other paraphilic disorders,⁴⁰ is believed to begin in childhood or adolescence and tends to be a lifelong, chronic disorder.⁴¹ There are two types of pedophiles, those who are sexually attracted only to children (exclusive type) and those who are sexually attracted to both adults and children (nonexclusive type).⁴²

B. MPA Treatment

Section 645 of the California Penal Code specifies the use of MPA or its chemical equivalent to treat certain sex offenders.⁴³ MPA is commonly referred to by its trade name Depo-Provera, a product of the Upjohn Company (now called Pharmacia-Upjohn).⁴⁴ It is a synthetic form of the hormone progesterone that is prescribed primarily as a female contraceptive.⁴⁵ Since the late 1960s, MPA has also been the subject of research in the treatment of men who suffer from certain sexual disorders, most frequently from one or more paraphilias.⁴⁶

40. Other paraphilias include exhibitionism, fetishism, frotteurism, sexual masochism, sexual sadism, transvestic fetishism, and voyeurism. *See id.* at 523. The most common paraphilias seen in clinics are pedophilia, voyeurism, and exhibitionism. *See id.* at 524.

41. *See id.* at 524.

42. *See id.* at 528.

43. *See* CAL. PENAL CODE §§ 645(a) & (b) (West Supp. 1997).

44. *See* PHYSICIAN'S DESK REFERENCE 2259 (Medical Economics Company ed., 1998) [hereinafter PHYSICIAN'S DESK REFERENCE].

45. MPA, or Depo-Provera, has been labeled for use as a contraceptive since 1992. *See* Warren E. Leary, *U.S. Approves Injectable Drug as Birth Control*, N.Y. TIMES, Oct. 30, 1992, at A1. *See also* PHYSICIAN'S DESK REFERENCE, *supra* note 44, at 2259. Previously, it was not used in the United States as a contraceptive because of animal studies which indicated an increased risk of certain cancers following long-term use. *See* Leary, *supra*.

46. *See* Money, *supra* note 18, at 165. MPA has not been labeled by the Food and Drug Administration for use as a treatment for paraphilias. *See* J. Kenneth Fuller, *Child Molestation and Pedophilia: An Overview for the Physicians*, 261 JAMA 602, 604 (1989). However, physician's may prescribe medication for an unlabeled use if "they share the basis for their recommendation with and gain the informed consent from the patient." *Id.* *See also infra* note 157. Other therapies used to treat paraphilias are behavior therapy, aversion therapy, and psychotherapy. *See* Grossman, *supra* note 1, at 424, 429-435; *see also* Gene G. Abel & Candice A. Osborn, *Pedophilia*, in TREATMENTS OF PSYCHIATRIC DISORDERS 1959, 1962-1973 (Glen O. Gabbard ed., 1995) (reviewing a variety of behavioral and cognitive therapies).

MPA, and other antiandrogens,⁴⁷ may be effective in treating men with a paraphilic disorder because of its physiological effect in decreasing the body's level of testosterone.⁴⁸ The decreased production of testosterone lowers the man's sex drive, and has a corresponding effect on the frequency of sexual fantasies.⁴⁹ This effect is reversible within several months from the time the treatment is discontinued.⁵⁰

C. MPA Treatment Studies

A number of studies demonstrate that MPA can be an effective treatment for pedophiles and other paraphilics.⁵¹ Although the studies generally include individuals who have previously been arrested or convicted of a sexual offense, there is no research data on the use of MPA treatment on involuntary subjects.⁵²

47. Antiandrogens are hormones or synthetic hormones that reduce the body's level of serum testosterone. See Grossman, *supra* note 1, at 426. In the United States, MPA has been studied and used to treat sexual disorders. See *id.* In Europe and Canada, cyproterone acetate (CPA), another antiandrogen, is used. See *id.* CPA is not available in the United States because it has not been approved by the Food and Drug Administration. See Fred S. Berlin, *Special Considerations of the Psychiatric Evaluation of Sex Offenders against Minors*, in JUVENILE PSYCHIATRY AND THE LAW 119, 127 (Richard Rosner & Harold I. Schwartz eds., 1989).

48. See Berlin, *supra* note 47, at 127. For a more comprehensive discussion of the science of hormonal activity and MPA, see John M. W. Bradford, *Organic Treatments for the Male Sexual Offender*, 3 BEHAV. SCI. & L. 355 (1985).

49. See Oscar A. Cordoba & James L. Chapel, *Medroxyprogesterone Treatment of Hypersexuality in a Pedophilic Sex Offender*, 140 AM. J. PSYCHIATRY 1036, 1037 (1983).

50. See Berlin & Meinecke, *supra* note 26, at 603.

51. See *id.*; Cordoba & Chapel, *supra* note 49, at 1036-37; Pierre Gagne, *Treatment of Sex Offenders with Medroxyprogesterone Acetate*, 138 AM. J. PSYCHIATRY 644, 644 (1981); Money, *supra* note 18, at 165; John Money & Richard G. Bennett, *Postadolescent Paraphilic Sex Offenders: Antiandrogenic and Counseling Therapy Follow-up*, 10 INT. J. MENTAL HEALTH 122, 122 (1981).

52. See Carol Bohmer, *Legal and Ethical Issues in Mandating Treatment: The Patient's Rights v. Society's Rights*, in THE SEXUAL AGGRESSOR 11 (Joanne G. Greer & Irving R. Stuart eds., 1983).

One MPA treatment program that is not mentioned in the legislative history of Section 645 is the state's own work at Atascadero State Hospital. The California Departments of Corrections and Mental Health, in conjunction with the National Institute of Mental Health, conducted a ten year counseling program for sex offenders at Atascadero. See Seligman, *supra* note 5, at C1. The program sent volunteer prisoners serving the last two years of their sentence to the state hospital for

MPA can be administered either as an injection or in pill form. However, it is usually injected because treatment compliance is easier to monitor.⁵³ MPA treatment requires regular injections and blood monitoring of testosterone levels, usually on a weekly or biweekly basis.⁵⁴ The dosage may be adjusted on an individual basis to ensure that sexual function is retained.⁵⁵ Dr. Fred Berlin, of Johns Hopkins University, one of the leading experts on the treatment of sexual disorders, has described MPA treatment as "a sexual appetite suppressant."⁵⁶ The effects of the treatment allow the patient relief from the demands and insistence of his sexual drive,⁵⁷ thereby helping him to conform his behavior to societal norms.⁵⁸

The Johns Hopkins University's National Institute for the Study, Prevention and Treatment of Sexual Trauma has been studying MPA and using it to treat certain sexual disorders since 1966.⁵⁹ In one study of twenty paraphilics, only three of twenty men had reoccurrences of deviant sexual behavior while on the medication, an eighty-five percent success rate.⁶⁰ Ten out of eleven men who discontinued MPA treatment against medical advice relapsed into deviant behavior.⁶¹ The patients

therapy. *See id.* Mark Daigle, the director of forensic psychiatric services at the hospital, reported that about 20 prisoners volunteered for the MPA treatment and experienced decreased sex drive under the drug's effects. *See* Leshner, *supra* note 4, at A3. However, the hospital did not track the prisoners, now released, to determine the long-range effectiveness of the treatment. *See id.* In 1993, the prisoners who were selected for the Atascadero program had an 11% recidivism rate, while the control group who declined treatment and remained in prison had a 15% recidivism rate. *See* Seligman, *supra* note 5, at C1. Regarding the new statute, Dr. Daigle said that "it would be difficult to tell how successful a mandatory program might be." Leshner, *supra* note 4, at A3.

53. *See* Berlin & Meinecke, *supra* note 26, at 603.

54. *See* Berlin, *supra* note 47, at 127.

55. *See id.*

56. Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 233, 235 (1989).

57. *See id.*; *see also* Fitzgerald, *supra* note 24, at 7.

58. *See* Fitzgerald, *supra* note 24, at 6-7; Fred S. Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in THE SEXUAL AGGRESSOR 103 (J. Greer and I. Stuart eds., 1983).

59. *See* Fitzgerald, *supra* note 24, at 8; *see also* Berlin & Meinecke, *supra* note 26, at 603; Money, *supra* note 18, at 165;

60. *See* Berlin & Meinecke, *supra* note 26, at 604.

61. *See id.* at 605.

underwent extensive psychiatric screening before treatment to ensure a complete psychiatric diagnosis and were monitored throughout the duration of the treatment.⁶² The treatment was not effective on patients who, in addition to being diagnosed with paraphilia, also have an antisocial personality.⁶³ In addition, patients who had alcohol or substance abuse problems had less success.⁶⁴ After treatment was discontinued, the relapse rate increased dramatically.⁶⁵ These results are similar to those of other researchers.⁶⁶

An important component of MPA treatment studies is some form of talk therapy.⁶⁷ MPA does not alter the nature of the patient's sexual desires.⁶⁸ Therefore, in order to prevent relapse, the patient must have an understanding of the stressors which trigger his deviant behavior.⁶⁹ Ideally, the patient gains or improves his ability to reorient his sexual desire to acceptable forms.⁷⁰

The possible medical effects of long-term MPA usage are unknown.⁷¹ Short-term side effects include weight gain, mild lethargy, cold sweats,

62. See Fitzgerald, *supra* note 24, at 5-6 n.23.

63. See Gagne, *supra* note 51, at 645.

64. See Berlin & Meinecke, *supra* note 26, at 605.

65. See *id.*

66. See Cordoba & Chapel, *supra* note 49, at 1037 (reviewing similar results of other studies); Gagne, *supra* note 51, at 645-46 (reporting that forty of forty-eight patients refrained from committing any offenses during MPA and counseling treatment; seven patients who were also diagnosed with antisocial personality "showed no change in sexual behavior."). The Rosenberg Clinic of Galveston, Texas, conducted a study with 40 men who were treated with Depo-Provera and counseling. See Seligman, *supra* note 5, at C1. Eighteen percent committed new crimes during treatment and an additional thirty-five percent committed new offenses after the MPA treatment ended. See *id.*; see also, *supra* note 52 (describing California's Atascadero study).

67. See Berlin & Meinecke, *supra* note 26, at 603. Specialists are opposed to the use of MPA without some form of therapy. See Seligman, *supra* note 5, at C1 (quoting Robert Freeman-Longo, director of the Safer Society Foundation, "you just don't use this drug in the absence of therapy.").

68. See Berlin & Meinecke, *supra* note 26, at 606.

69. See *id.* at 603; see also Seligman, *supra* note 5, at C1 ("Therapy that works involves group or individual sessions in which offenders learn to recognize the internal triggers that cause their behavior. Those can be loneliness, boredom, depression or external triggers like drugs, alcohol, or being around schools or playgrounds.").

70. See Berlin & Meinecke, *supra* note 26, at 603.

71. See Fitzgerald, *supra* note 24, at 7.

hot flashes, nightmares, hypertension, elevated blood sugar, shortness of breath, and lessened testis size.⁷²

MPA treatment studies have been constrained by certain methodological limitations.⁷³ One clear limitation on deriving accurate data is that relapse is largely measured by the patient's self-report.⁷⁴ The patient's family members and the police or probation officers also serve as additional sources of relapse information.⁷⁵ All three sources, however, are inherently unreliable indicators. The patient, at risk for arrest, is not motivated to discuss his relapse, while family members and police may not have full knowledge of the patient's behavior.⁷⁶ Success rates are therefore likely to be overstated.⁷⁷ Research critics also note that MPA studies are not amenable to normal clinical testing procedures, such as double-blind testing.⁷⁸ Because paraphilic behavior endangers the public, researchers cannot ethically utilize placebos to test the drug's effectiveness.⁷⁹ Finally, there has been no study of sufficient duration to determine the effects that long-term MPA usage may have on the male body.⁸⁰

II. PRIOR USE OF MPA TREATMENT IN THE CRIMINAL JUSTICE SYSTEM

Legislation requiring or permitting the use of MPA treatment is a new development in the law. The treatment has, however, been used within the criminal justice system on a voluntary basis, often as a condition of parole.⁸¹ In addition, several states, including Minnesota, Connecticut and Oregon, have studied the treatment for possible use in the criminal

72. See Icenogle, *supra* note 24, at 285 (1994) (citing Lehne, *Treatment of Sex Offenders with Medroxyprogesterone Acetate*, in 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY AND ENDOCRINOLOGY OF SEXUAL FUNCTION 516, 522 n. 46 (1988)).

73. See Grossman, *supra* note 1, at 422.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

78. See Grossman, *supra* note 1, at 426.

79. See *id.*

80. See *id.* at 436.

81. See John T. Melella et al., *Legal and Ethical Issues in the Use of Antandrogens in Treating Sex Offenders*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 223, 226 (1989).

justice system.⁸²

California has also studied MPA treatment for sex offenders. At Atascadero State Hospital, the Departments of Corrections and Mental Health conducted a ten year study of treatment programs for sex offenders, including twenty offenders who volunteered for MPA treatment.⁸³ However, the hospital has not tracked the prisoners, now released, to determine the long-range effectiveness of the treatment.⁸⁴

In the reported case law, MPA treatment has arisen in two contexts. In *Michigan v. Gauntlet*,⁸⁵ the Michigan Court of Appeals considered whether MPA treatment may be used as a judicially-imposed condition of probation.⁸⁶ In *Arizona v. Christopher*,⁸⁷ the Arizona Supreme Court considered whether MPA might be a constitutionally required rehabilitative treatment for a paroled sex offender.⁸⁸

In *Gauntlet*, the defendant, who was convicted of offenses arising from sexual intercourse with his fourteen year old stepdaughter, appealed the trial judge's sentence which conditioned probation on the requirement that the defendant undergo MPA treatment.⁸⁹ Although the defendant argued that the probation condition was unconstitutional, the Court of Appeals did not address the constitutional issues.⁹⁰ The court held that the probation condition was unlawful because, in the absence of a specific statutory provision, it was beyond the judge's authority to sentence a person to an "experimental treatment."⁹¹ The court determined that MPA treatment for sexual deviants had not gained acceptance in the medical community as a safe and reliable medical procedure.⁹² It also examined some of the clinical research, noting that in each instance MPA treatment was voluntary and accompanied by psychother-

82. See Anthony Schmitz, *A Shot in the Dark*, HEALTH, Jan. 1993, at 22-24.

83. See Seligman, *supra* note 5, at C1; see also Leshner, *supra* note 4, at A3.

84. See Leshner, *supra* note 4, at A3.

85. 352 N.W.2d 310, 314 (Mich. Ct. App. 1984), *modified*, 352 N.W.2d 463 (Mich. 1984).

86. See *id.* at 314.

87. 652 P.2d 1031 (Ariz. 1982).

88. See *id.*

89. See *Gauntlet*, 352 N.W.2d at 314.

90. See *id.*

91. See *id.* at 315-16.

92. See *id.* at 316. The court examined a report of the Connecticut Department of Corrections, *Report of the Depo-Provera Study Group* (Oct. 4, 1983), which found that the drug had significant safety concerns. See *id.* at 315.

apy.⁹³ The court was also concerned that the treatment was not available in any Michigan facility.⁹⁴

In *Christopher*, the Arizona Supreme Court discussed MPA treatment in the context of a defendant's constitutional argument that he had a right to treatment for his sexual disorder.⁹⁵ The defendant, a convicted sex offender, committed new offenses while on probation.⁹⁶ His probation was revoked, and he was convicted for the new offenses.⁹⁷ On appeal, the defendant argued that the state acquired a constitutional obligation to provide treatment when it placed him on probation, since his subsequent offenses subjected him to lengthy prison sentences.⁹⁸ He identified chemical castration and behavior modification therapy as the treatments the state was required to provide, based on the pre-sentence report of a psychiatrist in the first conviction.⁹⁹ The psychiatrist's report characterized chemical castration as a "drastic treatment."¹⁰⁰ The court found no persuasive legal basis for a due process right to rehabilitation, and did not directly address the propriety of MPA treatment.¹⁰¹

III. PROVISIONS OF THE STATUTE AND LEGISLATIVE HISTORY

A. Provisions of the Statute

Section 645¹⁰² requires a mandatory sentence of MPA treatment upon

93. *See id.*

94. *See id.* at 316. The Court referred to the "virtual impossibility of performance," questioning where the defendant would get the treatment and who would administer it. *See id.*

95. *Christopher*, 652 P.2d at 1032.

96. *See id.* at 1032.

97. *See id.*

98. *See id.* at 1032-33.

99. *See id.* at 1032.

100. *See Christopher*, 652 P.2d at 1032. The psychiatrist also reported that Christopher was a poor candidate for treatment because he was not motivated to change and did not show remorse for his conduct. *See id.*

101. *See id.* at 1034.

102. In the same legislation the prior § 645 was repealed. 1996 Cal. Stats. 596 § 1 (A.B. 3339). The prior § 645 authorized courts to order an operation for the prevention of procreation upon the conviction of a male or female of a sexual offense against a child under the age of ten. *See CAL. PENAL CODE* § 645 (1988). In one reported case, the court affirmed the sterilization of a man convicted of raping a thirteen year old girl and possibly infecting her with syphilis. *See People v. Blankenship*, 61 P.2d 352 (Cal. Ct. App. 1936).

parole for a second conviction for enumerated sex offenses where the victim is under thirteen years old.¹⁰³ It also provides for discretionary sentencing to the chemical treatment upon parole of first time offenders.¹⁰⁴ The statute took effect for convictions occurring after January 1, 1997.¹⁰⁵ It applies to the following offenses: forcible sodomy,¹⁰⁶ aiding and abetting forcible sodomy,¹⁰⁷ a forcible lewd or lascivious act,¹⁰⁸ oral copulation,¹⁰⁹ forcible oral copulation, or aiding and abetting

The text of the statute is:

Section 645: Medroxyprogesterone acetate treatment for parolees who have committed specified sex offenses.

(a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.

(c) This section shall apply to the following offenses:

(1) Subdivision (c) or (d) of Section 286.

(2) Paragraph (1) of subdivision (b) of Section 288.

(3) Subdivision (b) or (d) of Section 288a.

(4) Subdivision (a) or (j) of Section 289.

(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.

(f) The Department of Corrections shall administer this section and implement the protocols required by this section. Nothing in the protocols shall require an employee of the Department of Corrections who is a physician and surgeon . . . to participate against his or her will in the administration of the provisions of this section. These protocols shall include, but not be limited to, a requirement to inform the person about the effects of hormonal chemical treatment and any side effects that may result from it. A person subject to this section shall acknowledge the receipt of this information.

CAL. PENAL CODE § 645(a) (West Supp. 1997).

103. See CAL. PENAL CODE § 645.

104. See *id.* § 645(a).

105. See Victoria Slind-Flor, *Permanent Cuffs for Molesters?*, NAT. L. J., Jan. 27, 1997, at A6.

106. See CAL. PENAL CODE § 286(c) (West Supp. 1997).

107. See *id.* § 286(d).

108. See *id.* § 288(b)(1).

109. See *id.* § 288a(b).

forcible oral copulation of a person,¹¹⁰ and forcible penetration with a foreign object.¹¹¹

Under the statute, the treatment begins one week prior to the prisoner's release on parole, and continues "until the Department of Corrections demonstrates to the Board of Prison Terms that . . . [it] is no longer necessary."¹¹² The only way a parolee can avoid chemical castration is to undergo surgical castration.¹¹³ The Department must inform the prisoner both about the effects of MPA treatment and its side effects.¹¹⁴

B. Legislative History

Section 645 was introduced on April 17, 1996 in Assembly Bill 3339 by Assembly Member Bill Hoge.¹¹⁵ Originally, the proposed statute began, "[A]ny person guilty of a third conviction of any of the following offenses shall be *punished by chemical castration*."¹¹⁶ Assemblyman Hoge stated that the purpose of the bill was to prevent or lessen recidivism, noting that in the United States "about half of all [sex] offenders are rearrested."¹¹⁷

The bill was sponsored by a Pasadena-based organization called the Women's Coalition, which has been active in promoting legislative

110. *See id.* § 288a(d).

111. *See* CAL. PENAL CODE § 289(a), § 289(j).

112. *Id.* § 645(d).

113. *See id.* § 645(e).

114. *See id.* § 645(f).

115. The provisions of the original bill were:

Section 1. Section 667.73 is added to the Penal Code, to read:

(a) Any person guilty of a third conviction of any of the following offenses shall be punished by chemical castration, in addition to any other punishment prescribed by those provisions or any other provision of law:

(1) Subdivision (c) of Section 286.

(2) Subdivision (b) or (c) of Section 288a.

(3) Subdivision (j) of Section 289.

(b) The person shall be chemically castrated one week prior to his or her release from confinement in the state prison or other institution and shall continue chemical castration treatments until a panel of experts deems it no longer necessary.

(c) The person may choose permanent, surgical castration in lieu of chemical castration pursuant to this section.

A.B. 3339 (Cal. Apr. 17, 1996).

116. *Id.* (emphasis added). A legislative history of the bill can be found by visiting <<http://www.leginfo.ca.gov>>.

117. *Report of the Assembly Committee on Public Safety*, A.B. 3339 (Apr. 22, 1996), at 5 [hereinafter *Public Safety Report*].

measures to protect children from molesters.¹¹⁸ The Women's Coalition was founded by Susan Carpenter-McMillan, a former media representative and activist for the Right to Life League of Southern California,¹¹⁹ and consists solely of a six-member board.¹²⁰ The organization is funded by Carpenter-McMillan's husband, William McMillan, a personal injury attorney, with an estimated 1997 budget of \$15,000.¹²¹

The Women's Coalition proposed the measure following the release of Richard Muldrew, dubbed the "Pillowcase Rapist," from a California prison in December 1995.¹²² The Coalition developed the "chemical castration" proposal in response to the request of Muldrew's victims.¹²³ Carpenter-McMillan told the press that when "[w]e . . . asked what [the victims] wanted done . . . they all said that they wanted castration."¹²⁴ One of the victims later testified at the hearing of the Senate Committee on Criminal Procedure.¹²⁵

In the California Assembly, the bill was assigned to the Committee on Public Safety and the Appropriations Committee.¹²⁶ The Public Safety Committee recommended amendments to change the terms of subsection (b) so that the mandatory provision would apply after a second conviction rather than after a third conviction.¹²⁷ The Committee observed that few offenders would be subject to the statute on a third conviction since current sentencing requirements would keep the offenders in prison

118. See *Welcome to the Women's Coalition* (visited Jan. 4, 1999) <<http://www.womenscoalition.org/>>.

119. See Lloyd Grove, *Cause Celebre*, WASH. POST, Jul. 23, 1997, at C1. Carpenter-McMillan has also received national media attention in the past year because of her role as friend and sometime spokesperson for Paula Jones in Ms. Jones' lawsuit against the President. See *id.* See also Carla Hall, *Force of Nature*, L.A. TIMES MAGAZINE, Dec. 14, 1997, at 26.

120. See Hall, *supra* note 119, at 26.

121. See Grove, *supra* note 119, at C1.

122. See Vincent J. Schodolski, *California OKs 'Castration' Bill*, CHI. TRIB., Aug. 31, 1996, at A1.

123. See *id.*

124. *Id.*

125. See Nancy Hill-Holtzman, *State Panel OKs Chemical Castration Bill*, L.A. TIMES, Jul. 3, 1996, at B4.

126. See A.B. 3339 Complete Bill History (visited Feb. 9, 1999) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3301-3350/ab_3339_bill_history.html>.

127. See *Public Safety Report*, *supra* note 117, at 5.

without parole for twenty-five years to life.¹²⁸ The Committee also noted that the provisions might violate the California Constitution's prohibition on cruel and unusual punishment.¹²⁹ However, rather than contemplating what type of amendments might cure any state constitutional question, the Committee merely asserted that it is the "domain of the Legislature to craft laws that punish criminal behavior."¹³⁰

After passing the Assembly, the bill was sent to the Senate, where it was heard by the Committee on Criminal Procedure and the Appropriations Committee. The Senate added a provision giving judges the discretion to apply the statute to first-time offenders.¹³¹ Another provision was added to delegate the development of further policy to the Department of Corrections.¹³² The Senate amended the bill again, adding the informed "nonconsent" provision, which requires the Department of Corrections to inform the prisoner of the effects and side effects of chemical castration, and to acquire from the prisoner an acknowledgment that the information was provided.¹³³ The final amendment was made on August 20, 1996, when the Senate added the provision that state-employed doctors would not be forced to participate in the administration of MPA treatment.¹³⁴

The bill was supported by references to medical studies, particularly those of Dr. Fred Berlin of Johns Hopkins University.¹³⁵ However, the provisions were not written under the guidance of, or with the contribution of, medical experts.¹³⁶

By the time the bill was sent to the Governor, many of its practical, medical, and legal problems had been noted, without being addressed by

128. See *id.*

129. See *id.* at 6.

130. *Id.*

131. See *Report of the Senate Committee on Criminal Procedure*, A.B. 3339 (June 17, 1996), at 5 [hereinafter *Criminal Procedure Report*].

132. See *Floor Report of the Senate Rules Committee*, A.B. 3339 (Jul. 9, 1996), at 4 [hereinafter *July Floor Report*].

133. See *id.*

134. See *Floor Report of the Senate Rules Committee*, A.B. 3339 (Aug. 20, 1996), at 5 [hereinafter *August Floor Report*].

135. See, e.g., *Criminal Procedure Report*, *supra* note 131, at 6-7.

136. See Shari Roan, *No Consensus on Chemical Castration*, L.A. TIMES, Sept. 26, 1996, at E1. "This law hasn't been done out of a collaboration between medical and science people and the criminal justice system . . . the legislature did not say . . . let's get some experts together and ask them what would make sense." *Id.* (quoting Dr. Fred Berlin).

further amendment. Issues raised in the Senate Committee on Criminal Procedure included the absence of a counseling provision, the ethical concerns of health professionals in forcing parolees to submit to treatment, the legality under California law of forcing parolees to accept an unwanted medical treatment, and federal constitutional issues.¹³⁷

The Floor Report of the Senate Rules Committee noted that the "measure poses serious bioethical problems . . . [including] whether the state should 'practice medicine' by . . . mandating weekly injections regardless of effectiveness, . . . [and] regardless of whether individuals can tolerate the drug."¹³⁸ The Committee also noted that "[t]his measure poses serious . . . legal problems [and] . . . this drug merely functions as a form of birth control with women."¹³⁹

The California Psychiatric Association (CPA) opposed the bill because "psychiatrists fundamentally believe that not all offenders would necessarily benefit from this type of treatment intervention."¹⁴⁰

Dr. Berlin, whose research and statements were used by the legislature to bolster its position on the effectiveness of MPA treatment of sex offenders,¹⁴¹ was also quoted on the medical and ethical concerns of the psychiatric community.¹⁴² He "would be opposed to the imposition of Depo-Provera treatment upon an unwilling individual . . . in the absence of medical testimony that such treatment was appropriate, and in the absence of prior agreement from the prospective patient that he was interested in receiving it."¹⁴³

Other parties who opposed the bill were the California Attorneys for Criminal Justice and the American Civil Liberties Union (ACLU).¹⁴⁴

137. See *Criminal Procedure Report*, *supra* note 131.

138. See *August Floor Report*, *supra* note 134, at 8.

139. See *id.*

140. See *id.* (quoting an August 2, 1996 letter to Assemblyman Bill Hoge from the California Psychiatric Association in opposition to A.B. 3339).

141. See, e.g., *August Floor Report*, *supra* note 134, at 5-6.

142. See *Criminal Procedure Report*, *supra* note 131, at 8 (including Dr. Berlin's remarks critical of the imposition of MPA treatment on convicted sex offenders). The final Senate report, the Floor Report of the Committee on Rules of August 20, 1996, does not include these remarks and only cites Dr. Berlin's research and statements on success rates of testosterone-reducing therapies and surgeries. See *August Rules Report*, *supra* note 134.

143. *Criminal Procedure Report*, *supra* note 131 (citing Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY L. 233, 236 (1989)).

144. See *August Floor Report*, *supra* note 134, at 7.

The California Attorneys for Criminal Justice cautioned that forcibly medicating people violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁴⁵ The ACLU was particularly concerned that the treatment was not voluntary and that it did not include any counseling.¹⁴⁶ The ACLU noted that none of the law enforcement agencies supported the bill.¹⁴⁷

No organization other than the Women's Coalition supported the bill.¹⁴⁸

C. Two Years Later: Developments

Since 1996, there have been few developments in the application of Section 645, precluding any practical determinations about its application and effectiveness. The Department of Corrections decided that Section 645 applies only to prisoners who were sentenced after the law took effect on January 1, 1997.¹⁴⁹ Under current sentencing provisions, which impose a minimum of three years for the applicable offenses,¹⁵⁰ the statute will be applied or challenged in the coming years. The Department of Corrections also decided that the Department itself cannot order MPA injections without first obtaining a court order.¹⁵¹ By late 1998, eleven cases were referred to the courts and in only one case was the treatment ordered.¹⁵² In that case, the prisoner will not be eligible for parole until 2002.¹⁵³

The Board of Prison Terms, the agency responsible for determining parole conditions generally, as well as deciding when the ordered treatments end, recently promulgated two regulations under Section 645.¹⁵⁴ One regulation simply restates the Board's responsibility under Section

145. See Schodolski, *supra* note 122, at 1.

146. See *August Floor Report*, *supra* note 134, at 8-9.

147. See *id.*

148. See *id.*

149. See Associated Press, *After a Year, Castration Law has been Invoked Just Once*, SAN DIEGO UNION-TRIBUNE, Nov. 26, 1998, at A6 [hereinafter *Castration Law*].

150. See *August Floor Report*, *supra* note 134, at 4 (summarizing the sentencing provisions of the applicable offenses).

151. See *Castration Law*, *supra* note 149, at A6.

152. See *id.*

153. See *id.*

154. See CAL ADMIN. CODE tit. 15, §§ 2513.1-2513.2 (1998).

645.¹⁵⁵ The second establishes a hearing procedure to be used when the Department of Corrections determines that the treatment is either no longer necessary, or that the parolee has a medical condition requiring termination of the treatments.¹⁵⁶ It remains to be seen whether the Department of Corrections will combine Section 645's chemical castration provision with other types of therapy.

IV. PRESCRIBING MEDICINE BY LEGISLATIVE ENACTMENT

When a state mandates that individuals receive an involuntary medical treatment, important bioethical and constitutional issues necessarily arise.¹⁵⁷ Section 645, however, adds yet another difficulty: it erases the role of the doctor from the treatment.

California has a powerful interest in preventing sexual assault against children. The statute California enacted to help achieve that goal, however, pulls a medical treatment into the criminal justice system¹⁵⁸ without bringing along the doctor.¹⁵⁹ Section 645 by its terms prevents indi-

155. *See id.* § 2513.1.

156. *See id.* § 2513.2. Since the regulation speaks of *terminating* treatment in the case of a parolee's medical condition, it appears that the Board does not consider itself to have the discretion to order, *prior* to the imposition of the treatment, that *no* treatments be given to a parolee coming under the statute's mandate. The regulation does provide that the Board can order suspension of the treatments while the hearing is pending. *See id.*

157. *See, e.g.,* Melella, *supra* note 81, at 223.

158. Under California law, individuals, including prisoners, have a fundamental right to refuse medical treatment, but this right can be outweighed by countervailing state interests, including the protection of third parties. *See Thor v. Andrews*, 855 P.2d 375, 387 (Cal. 1993) (explaining that the concern for third parties can arise when the refusal of medical treatment endangers public health).

159. It is possible that § 645 violates the misbranding provisions of the Food, Drug and Cosmetic Act (FDCA). Depo-Provera has not been labeled for the treatment of sexual disorders. *See Max Vanzi, Assembly OKs Castration Drug for Molesters*, L.A. TIMES, Aug. 31, 1996, at A1. The Food and Drug Administration (FDA) has "previously interpreted FDCA's labeling requirements to impose upon FDA the 'obligation' to investigate and take appropriate action against unapproved uses of approved drugs where such unapproved use becomes widespread or endangers the public health." *Chaney v. Heckler*, 718 F.2d 1174, 1176 (D.C. Cir. 1984) (quoting *Legal Status of Approved Labeling for Prescription Drugs: Prescribing for Uses Unapproved by the Food and Drug Administration*, 37 FED. REG. 16503, 16504 (Aug. 15, 1972)), *overruled on other grounds*, *Heckler v. Chaney*, 470 U.S. 821 (1985). Although doctors are permitted to prescribe medications for off-label uses under the "practice of medicine" exception, *see Chaney*, 718 F.2d at 1179-80,

vidualized diagnosis of the offender,¹⁶⁰ fails to provide a standard to determine the dosage of MPA, and creates the possibility that offenders might be subjected to a continuing ineffective treatment.¹⁶¹ Moreover, Section 645 applies equally to both male and female offenders, although each responds very differently to MPA. These legislative choices are contrary to public policy, to established medical ethics,¹⁶² and to common sense.

Under the provisions of § 645, the entire class of twice-convicted child sex offenders will be given MPA treatment without consideration of whether the treatment is appropriate for any individual offender. In particular, MPA is unlikely to be effective on a pedophile who is also a substance abuser, or on an individual with an antisocial personality.¹⁶³ This approach will, therefore, subject some offenders to an indefinite course of medication that may not be effective.¹⁶⁴

MPA also has significant side effects which may require medical supervision. For example, it can raise blood pressure, requiring some patients on MPA to receive additional medical treatment for the elevated blood pressure brought on or made worse by MPA.¹⁶⁵ Without a prior examination and medical history taken by a doctor, some individuals with preexisting medical conditions, for whom MPA would be contrain-

a statutory mandate like Section 645 would probably not fall within this exception. In *Chaney*, the court held that a state's use of drugs for the purpose of lethal injection when the drugs were not labeled for that use was not an off-label use permitted under the practice of medicine exception. *See id.* Finding that Congress' intention was to prevent FDA interference with the doctor's treatment of his patient, the court held the state's off-label use in the capital punishment context was a non-medical use that was not covered by the exception. *See id.* An FDA spokeswoman said that it was unclear if state criminal justice officials had the same authority as physicians to prescribe drugs for unlabelled purposes. *See Vanzi, supra.*

160. *See supra* note 102 for the exact language of the statute.

161. *See August Floor Report, supra* note 134.

162. *See* Richard Lacayo, *Sentences Inscribed on Flesh*, TIME, Mar. 23, 1992, at 54, 59. "Physicians have no business acting as agents of the state to punish people." *Id.* (quoting Dr. George Annas, professor of health law at Boston University Medical School).

163. *See supra* notes 63-64 and accompanying text.

164. *See* Berlin & Meinecke, *supra* note 26, at 603.

165. *See* Seligman, *supra* note 5, at C-1 ("Parolees who get Depo-Provera will need medical follow-up The drug can cause high blood pressure, gallstones, migraine headaches, complications for diabetics and muscle soreness around the injection sites.")

dicated, would be endangered by the treatment.¹⁶⁶

Perhaps the most glaring issue that the legislature failed to correct is the law's application to women.¹⁶⁷ The statute mandates the treatment upon a second conviction of offenses for which both male and female offenders may be convicted.¹⁶⁸ The treatment, however, has not been used on female sexual disorder patients because MPA is solely a contraceptive when taken by women.¹⁶⁹ Since MPA has no effectiveness as a preventative measure for female recidivism, the application of the law to women subjects them to an ineffective medical treatment while controlling their fertility.

A significant area of concern for mandatory MPA treatment is the question of what dosage should be used. Section 645 does not contain a specific dosage requirement. In MPA treatment, the same dosage affects different individuals differently.¹⁷⁰ Each patient requires monitoring to ensure proper dosage.¹⁷¹ Also, the patient gives self-reports so that the doctor can determine the frequency and intensity of sexual fantasies.¹⁷² Another important consideration is to what extent the individual can experience sexual arousal.¹⁷³ Psychiatrists attempt to adjust the dosage to the individual so that the frequency and intensity of sexual fantasies is reduced to the level at which the individual remains in control of his conduct without removing all sexual function.¹⁷⁴ However, at high enough dosages, each male recipient could be rendered impotent

166. See *August Floor Report*, *supra* note 134. The absence of medical screening provisions can also be seen in the fiscal analysis of the bill, which calculates cost estimates solely on the basis of the price of the weekly dosage of MPA. See *July Floor Report*, *supra* note 132, at 7. MPA costs approximately \$40.00 per injection. See *id.* The Department of Corrections stated that there were 687 paroled sex offenders who had been convicted twice of the specified offenses at the time the bill was under consideration in 1996. See *id.*

167. See *id.*

168. See CAL. PENAL CODE §§ 286(c), 286(d), 288(b)(1), 288a(b), 288a(d), 289(a) (West Supp. 1997).

169. See PHYSICIAN'S DESK REFERENCE, *supra* note 44, at 2083.

170. See Berlin & Meinecke, *supra* note 26, at 605. In various studies a weekly injection of 100 to 800 milligrams of MPA has been used. See Fitzgerald, *supra* note 24, at 6 (citations omitted).

171. See Money & Bennett, *supra* note 51, at 125.

172. See *id.*

173. See *id.*

174. See Berlin & Meinecke, *supra* note 26, at 603.

throughout the treatment.¹⁷⁵

Section 645 does not clarify its intent with regard to the desired result. Since the statute was enacted with the specific purpose of preventing recidivism,¹⁷⁶ and is not concerned directly with treatment, it is conceivable that the statute would be interpreted as intending to render the sex offender impotent. The placement of the section in the penal code, as well as its operation as a component of a criminal sentence, would support this result.

A third element of concern is that the statute specifies that the treatment is to continue "until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary."¹⁷⁷ Since pedophilia is considered a chronic disorder that has no cure,¹⁷⁸ for pedophile offenders, MPA treatment may be continued throughout the duration of parole.¹⁷⁹ For offenders who are not pedophiles, MPA will be less effective, or perhaps entirely ineffective.¹⁸⁰ Under the terms of the statute, however, the Department of Corrections would not have the discretion to decide that such an offender should not receive MPA treatment. It would be difficult for the Department of Corrections to establish that the treatment is no longer necessary when it cannot make assurances about future behavior. Since there is no data on the long-term effects of MPA on the male body, it is unknown whether indefinite use of MPA is harmful.¹⁸¹

California has a comprehensive statutory structure to regulate the practice of medicine for the protection of the public.¹⁸² The Medical Practice Act makes it unlawful to practice medicine without a license.¹⁸³ Furthermore, it is a felony if such unlawful practice puts any individual in serious risk of danger.¹⁸⁴ It is clear from the provisions of the Medical Practice Act that the state considers the practice of medicine to be professional activity requiring a high degree of regulation to protect the

175. *See id.*

176. *See Preamble*, A.B. 3339, 1996 Reg. Sess. (Cal. 1996).

177. CAL. PENAL CODE § 645(d) (West Supp. 1997).

178. *See* DSM-IV, *supra* note 28, at 528.

179. *See August Floor Report*, *supra* note 134, at 7-8.

180. *See* Berlin & Meinecke, *supra* note 26, at 603.

181. *See* Grossman, *supra* note 1, at 436.

182. *See* Medical Practice Act, CAL. BUS. & PROF. CODE § 2000 (West 1988).

183. *See id.* § 2053.

184. *See id.*

health of the public.¹⁸⁵ The Act also prohibits the prescription of medicine without a prior examination.¹⁸⁶ This provision is consonant with the American Medical Association's Code of Ethics.¹⁸⁷ The central element of medical practice is the doctor-patient relationship, in which treatment is recommended on an individual basis.¹⁸⁸

The American Medical Association (AMA) opposes the use of medical treatment as a part of criminal penalties.¹⁸⁹ In the context of surgical castration, the AMA's Ethics and Health Policy Council has said that, even if the prisoner gives consent to the procedure, "anything settled in a courtroom cannot be considered voluntary."¹⁹⁰ Another medical ethicist stated that "no medical procedure should be done without an indication and the chance of success."¹⁹¹ Additionally, several victims' therapists have expressed the concern that chemical and surgical castration impart a "false sense of security" because so many sex offenses are motivated by factors that are not responsive to decreased testosterone.¹⁹² Moreover, professionals who work with sex offenders have been critical of California's statute. In a recent report published by the Department of Justice, California's chemical castration statute was criticized on ethical grounds for subjecting individuals to a drug that the Food and Drug Administration has not approved for use with child molesters; on practical grounds, because sex offenders are not likely to comply with an involuntary treatment; and on empirical grounds, because the drug has not

185. *See id.*

186. *See id.* § 2242(a) ("Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4211 without a good faith prior examination and medical indication therefor, constitutes unprofessional conduct.").

187. *See* COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS 116 (1996-1997 ed.).

188. "From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient." *Id.* at xli. The doctor's relationship to his or her patient is described as a fiduciary relationship. *See id.*

189. *See* Lacayo, *supra* note 162, at 54. "An ethical doctor would not prescribe a highly questionable drug with numerous side effects to an involuntary patient." Mary Lynne Vellinga, *Castration Law Under Fire*, SACRAMENTO BEE, Feb. 4, 1997, at A1 (quoting Barbara Schwartz, head of sex offender treatment programs at the Massachusetts Department of Corrections).

190. *See* Jennifer Liebrum, *Castration Alternatives Criticized*, HOUSTON CHRONICLE, Feb. 7, 1992, at A-21.

191. *Id.*

192. *See id.*; *see also* Seligman, *supra* note 5, at C1.

been proven to be effective without other treatment therapies and has not been proven to work on all types of child molesters.¹⁹³ The Association for the Treatment of Sexual Abusers does not support the statute primarily because of its failure to provide for a thorough diagnostic evaluation, on-going medical supervision, appropriate monitoring, and a comprehensive treatment plan.¹⁹⁴ Others have expressed concern that the law will backfire when parolees who receive the involuntary treatment become embittered or angry.¹⁹⁵

Furthermore, the provisions of Section 645 may violate existing California law. Under state constitutional and common law, no competent person may be subjected to involuntary treatment.¹⁹⁶ This civil right was expressly extended to include prisoners by statutory provision, although the statute permits the state to deny a prisoner a civil right in order to maintain prison security or public safety.¹⁹⁷ To apply Section 645, California must establish that the statute serves to protect public safety. Because there is no medical evidence that MPA treatment will be effective on an involuntary patient,¹⁹⁸ and because there is medical evidence that it will not be effective for all categories of sex offenders¹⁹⁹ or women,²⁰⁰ it would be hard for the state to establish in particular cases that the public safety assured by the statute outweighs the violation of the parolee's civil rights.

Dr. Berlin indicated that he believes there is a role for MPA treatment within the criminal justice system.²⁰¹ He referred to compulsory vacci-

193. See Robert A. Prentky et al., *Child Sexual Molestation: Research Issues* 15-16 (National Institute of Justice, 1997) (visited Jan. 12, 1999) <<http://www.ncjrs.org/resdocs.htm>>.

194. See Association for the Treatment of Sexual Abusers, *Anti-Androgen Therapy and Surgical Castration Policy*, (adopted Feb. 7, 1997) (last updated Mar. 11, 1998.) <<http://www.atsa.com/pages/policy/anti.html>>.

195. See *Chemical Castration Law May Backfire*, ACLU NEWSWIRE, Sept. 18, 1996 (quoting Dr. Berlin) (visited Jan. 4, 1999) <<http://www.aclu.org/news/w09189a.html>>).

196. See *Keyhea v. Rushen*, 223 CAL. RPTR. 746 (App. 1 Dist. 1986); *Foy v. Greenblott*, 190 CAL. RPTR. 84 (1983); *Cobbs v. Grant*, 502 P.2d 1 (1972). *Keyhea* was also cited in the Senate Committee on Criminal Procedure Report of July 9, 1996, among others.

197. See CAL. PENAL CODE § 2600 (West 1982 & Supp. 1999).

198. See *supra* note 52 and accompanying text.

199. See *supra* Part I(C) at 8.

200. See *supra* Part IV at 20.

201. See Berlin, *supra* note 56, at 238.

nations²⁰² as precedent for the notion that medical treatment can be mandated when there is a clear risk to the well-being of others.²⁰³ However, he is

opposed to the imposition of Depo-Provera treatment upon an unwilling individual, as occurred in the . . . *Gauntlet* case, in the absence of medical testimony that such treatment was appropriate, and in the absence of prior agreement from the prospective patient that he was interested in receiving it In the future if it were to become clear that given individuals could live safely within the community while taking Depo-Provera but could not in its absence, then society might well determine that such persons need either to take it or be quarantined. . . . The author does not believe that the evidence of guaranteed increased safety to the community . . . is at this point in time sufficiently compelling to justify mandating it as treatment in the case of an unwilling individual.²⁰⁴

V. CONCLUSION

Section 645 sailed through the Legislature without careful consideration of the proper use of MPA treatment. Its application will no doubt be fraught with the issues addressed in this Comment, such as ineffectiveness, uncertain duration of treatment, and lack of appropriate medical supervision. Had the medical community been consulted during the crafting of this statute, many of these questions could have been addressed.

The prevention of sexual offenses against children is of vital importance, and should involve both the criminal justice system and the medical profession. MPA treatment has the potential to play a valuable role in the prevention of recidivism of pedophiles. Its potential, however, should be developed by medical experts. In removing the doctor from the treatment, Section 645 serves as another punitive tool rather than serving its intended use as a medical treatment.

Audrey Moog

202. See *id.* at 236. Dr. Berlin is referring to the compulsory vaccinations upheld in *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905) (state's police power is sufficient to justify compulsory vaccinations where the purpose is to ensure public safety).

203. See *id.*

204. *Id.*

